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PATENT AND TRADEMARK OFFICE

Peoria Office  
January 24, 1994

Via Federal Express

Mr. William F. Caton  
Acting Secretary  
Federal Communications Commission  
1919 M Street, NW  
Washington, D.C. 20554

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**Re: In Re: Comments of Barden Cablevision, Detroit, Michigan; In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992; Compatibility Between Cable Systems and Consumer Electronics Equipment; ET Docket No. 93-7**

Dear Mr. Caton:

Enclosed is the original and 14 copies of the above-referenced document for filing.

The prompt dissemination of this information to the Commissioners and appropriate staff members is greatly appreciated.

If you have any questions or comments, please call us.

Very truly yours,

HOWARD & HOWARD

  
Frederick G. Hoffman

Enclosures  
cc: John Rawcliffe  
caf312cable/caton.ltr

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**Dated: January 24, 1994**

## TABLE OF CONTENTS

SUMMARY .....	i
I. <u>INTRODUCTION</u> .....	1
II. <u>IMPLEMENTATION OF THE BASIC TIER SCRAMBLING PROHIBITION SHOULD BE DELAYED</u> .....	2
III. <u>SINGLE TIER OPERATORS CURRENTLY SCRAMBLING THEIR SIGNAL SHOULD BE EXEMPTED FROM THE PROHIBITION</u> .....	4
IV. <u>THE BASIC TIER SCRAMBLING PROHIBITION SHOULD BE LIMITED ONLY TO THE REQUIRED CONTENTS OF THE BASIC TIER</u> .....	5
V. <u>A COMPLETE PROHIBITION AGAINST SCRAMBLING THE BASIC TIER IS CONTRARY TO LEGISLATIVE INTENT</u> .....	7
VI. <u>CONCLUSION</u> .....	9

## SUMMARY

Barden Cablevision, which provides a single 59-channel tier of service in the Detroit, Michigan, area, submits these Comments in opposition to that part of the *Notice of Proposed Rulemaking* ("Notice")<sup>1</sup> proposing prohibition of scrambling of the basic tier, and suggests that such prohibition ignores serious theft exposure for operators offering a single tier, and that less onerous alternatives exist consistent with Congressional intent to improve compatibility between cable systems and consumer equipment.

Specifically, Barden Cablevision urges the Commission to consider modification of its proposed prohibition against scrambling the basic tier as follows:

1. Delay implementation of the prohibition against scrambling the basic tier in those instances where only a single tier is offered by an operator, until such time as new technologies have been sufficiently identified and made readily available to facilitate compatibility between signal scrambling and consumer electronic equipment; or
2. Allow operators offering only single tier service such as Barden Cablevision, who have currently expended or had plans in place to expend significant capital to install signal scrambling, to be exempted from the proposed prohibition; or
3. Limit the scrambling prohibition to the minimum contents of the basic tier defined in 47 C.F.R. 76.901.

Any of the above recommendations would avoid harsh economic impact to those

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<sup>1</sup>In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, *Notice of Proposed Rulemaking*, ET Docket No. 93-7 (Released December 1, 1993).

operators (and their subscribers) offering only single tier service, yet more closely mirror the express Congressional intent in balancing the needs and interests of cable operators of protecting their signals against theft or unauthorized use with improved compatibility between system and consumer equipment.

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of )  
 )  
Implementation of Section 17 )  
of the Cable Television )  
Consumer Protection and )  
Competition Act of 1992 )  
 )  
Compatibility Between Cable )  
Systems and Consumer Electronics )  
Equipment )

ET Docket No. 93-7

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**COMMENTS OF BARDEN CABLEVISION**

**I. INTRODUCTION**

Barden Cablevision ("Barden") provides cable service to approximately 116,000 subscribers in Detroit, Michigan, with its principal office located at 12755 Lyndon, Detroit, Michigan. Barden has been providing single tier service since 1986, which currently consists of 59 channels. Of those channels, 11 are local broadcast channels; three are public, education or government access channels; and 45 are cable programming channels. Due to theft of service problems similar to those experienced by most cable operators in large urban areas, Barden had plans in place to commit substantial resources<sup>2</sup> to permit its addressable system to scramble all tier services.

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<sup>2</sup>Barden's theft of service concerns are based on reality, not mere hypotheses. Barden had plans well underway to invest approximately \$2.5 million of cold hard cash to protect certain services on its tier from theft. Implementation of those plans was suspended upon issuance of the *Notice*.

## II. IMPLEMENTATION OF THE BASIC TIER SCRAMBLING PROHIBITION SHOULD BE DELAYED

As the Commission acknowledges in the *Notice*, long-term solutions to current compatibility problems between cable systems and consumer equipment mandate the introduction of both new consumer electronics and cable equipment. Indeed, much of the Commission's discussion in the *Notice* posits and invites proposals for new standards necessary to ensure effective interface between system and equipment with sufficient flexibility to allow the eventual transition from analog to digital systems. The Commission has suggested the required use of an updated Decoder Interface Connector and associated component descrambler units as the most practical solution for insuring compatibility between scrambling technology and consumer equipment.<sup>3</sup> However, the most desirable solution suggested by the Commission is use by cable operators of technologies that provide all authorized signals in the clear, necessitating the continued development of traps, interdiction, addressable filters and other clear channel delivery systems which eliminate the need for additional subscriber equipment.<sup>4</sup> As the Commission further notes, the Cable-Consumer Electronics Advisory Group ("CAG") believes it feasible to establish a standard security interface system that takes place over the next several years.<sup>5</sup>

Barden proposes that implementation of the basic tier scrambling prohibition be delayed until at least those target dates established for the implementation of a standard security interface system, or until there is sufficient time for the industry to develop the technology consistent with

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<sup>3</sup>*Notice*, at Par. 19.

<sup>4</sup>*Notice*, Par. 33.

<sup>5</sup>*Notice*, Par. 34.

Congressional intent and the Commission's long-term proposed standards. Delayed implementation of new scrambling technology for all service tiers ensures equal protection to those operators offering a single tier from the disparate economic consequences of an immediate prohibition of scrambling all signals on its single tier.

Although the Commission's proposed ban on scrambling of basic tier services may well be the direction of the future, the Commission is not under a congressional mandate to prohibit such scrambling immediately. Rather, although the 1992 Cable Act requires the Commission to enact regulations regarding consumer electronics equipment compatibility, Congress also required the Commission to balance a number of factors including "providing effective protection against or unauthorized reception of cable service."<sup>6</sup> Therefore, it is within the full discretion of the Commission, if it chooses to enact a ban on the scrambling of basic tier services, to delay the implementation date for several years until alternate security technology can be refined and deployed.

Barden has incurred substantial capital costs building a fully addressable system and was in the process of preparing to deploy scrambling technology to certain "cable programming" type services currently carried on its single tier for purposes of combatting theft and unauthorized use. Barden, because it currently chooses to offer a single tier, should be treated no more harshly than the industry as a whole in implementation of timetables for the development of new scrambling technologies. Otherwise, Barden and its subscribers must absorb a severe economic penalty in abandoning or altering its present addressable platform for its single tier, simply because it chooses to offer only one tier. The proposed complete prohibition of scrambling on

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<sup>6</sup>47 U.S.C. § 544(A)(c)(1)(A).



the basic tier is inequitable to operators offering only a single tier which now scrambles all signals, and the less burdensome approach would be to delay the prohibition on scrambling the basic tier two to three years to allow such operators to develop alternative descrambling technology and an opportunity to amortize their current investment in addressable technology.

III. **SINGLE TIER OPERATORS CURRENTLY SCRAMBLING THEIR SIGNAL SHOULD BE EXEMPTED FROM THE PROHIBITION**

The Commission, in justifying its proposal to prohibit scrambling of the basic tier, observes that "most" basic services are currently carried unscrambled.<sup>7</sup> Therefore, exempting from the prohibition only those single tier operators in the small minority currently scrambling (or those with bona fide plans as of the date of the *Notice* to scramble their basic tier) will still carry out Congressional intent of promoting immediate compatibility between cable systems and consumer electronics to "most" consumers. In fact, if such grandfathering were not allowed, then the premise upon which the Commission relies, that "most" basic services are carried unscrambled, should be seriously re-examined.

Such an exemption for Barden and other similarly situated operators providing single tier service is not only therefore equitable, but avoids disparate economic impact on the small minority of operators currently scrambling or planning to scramble signals on their single tier offering.

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<sup>7</sup>*Notice*, Par. 13.

IV. **THE BASIC TIER SCRAMBLING PROHIBITION SHOULD BE LIMITED ONLY TO THE REQUIRED CONTENTS OF THE BASIC TIER**

In the *Notice*, the Commission observes that cable systems frequently include additional channels on its basic tier beyond those required and requests comment on whether such signals should be exempted from the prohibition on scrambling of signals.<sup>8</sup> Barden submits that additional channels carried on a single tier, or basic tier,<sup>9</sup> beyond those required must be exempted from the prohibition on scrambling of signals on the basic tier to be consistent with Congressional intent.

Prohibiting scrambling of the mandatory basic tier components, while permitting scrambling of cable programming services effectively balances the demand for compatibility with the needs and interests of operators in providing effective protection against theft or unauthorized reception of cable service. While this solution may involve more expense to those operators providing service without addressable boxes, this compromise has compelling merit in that it preserves the operator's right to use existing scrambling technology to protect services that are susceptible to theft. Unauthorized use or theft is discouraged where the only signals one could obtain without a decoder box are the signals that are available off-the-air.

An across-the-board prohibition of scrambling basic tier signals place tier operators offering only a single tier at a distinct economic disadvantage and truly places form over substance. Those operators offering only single tier cable services would obviously have a disproportionate exposure to loss by theft or unauthorized use than those operators in the

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<sup>8</sup>*Id.*

<sup>9</sup>Barden offers 40 channels of service that are not required to be part of the basic tier.

majority who offer cable programming services on enhanced tiers not subject to the proposed prohibition.

No matter what action Barden takes, there will be, regrettably, some loss to theft of service. Barden also recognizes, however, that it is only human nature that the greater the rewards for a certain course of conduct, the greater the number of people who will attempt to take advantage of it. Congress did not lose sight, and the Commission should not either, of the fact that theft of service is stealing. Shoplifting is stealing. Theft of service is very similar in all respects to shoplifting. The difference between stealing basic cable service where it consists of 14 broadcast and access channels versus 59 total channels is the difference between shoplifting at the Salvation Army Second Hand Store versus Macy's.<sup>10</sup> Therefore, since theft of an unscrambled signal is relatively easy, especially in multiple unit buildings, Barden's theft rate would be much lower if, in fact, it were allowed to scramble at least the 45 "cable programming services" channels.

Even though the Commission's discussion focuses on preventing the theft of the cable operator's signal, just as in shoplifting, the theft of cable services results in higher prices to all subscribers. The operators do not pay for theft of service, subscribers and franchising authorities do.<sup>11</sup>

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<sup>10</sup>By making this analogy, Barden in no way intends to disparage off-the-air broadcast signals, or the Salvation Army; however, such signals are just that, available off-the-air without the payment of any additional money by the viewer of the signal. Therefore, the propensity to steal a service consisting only of broadcast signals is greatly diminished.

<sup>11</sup>Because Barden Cablevision pays the City of Detroit a franchise fee of 5% of gross revenues, any reduction in gross revenues resulting from the theft of service results in lower franchise fees to the City.

Again, if the Commission's premise that most basic services currently are carried unscrambled is true,<sup>12</sup> then permitting operators at a minimum, to scramble signals of additional channels beyond the required basic tier components will have little impact, if any, upon improving compatibility between consumer equipment and cable systems.

V. **A COMPLETE PROHIBITION AGAINST SCRAMBLING THE BASIC TIER IS CONTRARY TO LEGISLATIVE INTENT**

In adopting Section 634 of the Cable Communication Policy Act of 1984 (47 U.S.C. §553) Congress acknowledged the then increasing problem of theft of cable service. Committee comments in the legislative history of the adoption of Section 634 acknowledged that theft of service deprives the cable industry of millions of dollars of revenue each year and poses a major threat to the economic viability of operators, and creates inequitable burdens on paying subscribers who are forced to subsidize the benefits received by nonpaying recipients.<sup>13</sup> According to Committee Comments, theft of cable service takes on many forms ranging from the sale of devices permitting reception of cable service without compensation, "tapping" by one apartment tenant into the building cable system wire used to provide service to an adjoining tenant, to the illegal sale by apartment superintendents of abandoned cable converters to new tenants. These forms of theft allow perpetrators to obtain cable service without paying installation costs or to access premium movie or sports channels without payment.<sup>14</sup>

While states have adopted more stringent criminal statutes designed to counteract unauthorized use or theft of cable service, such theft persists and remains today an even more

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<sup>12</sup>Notice, Par. 13.

<sup>13</sup>Legislative history, PL 98-549, P83.

<sup>14</sup>*Id.*

significant drain on the industry.

In its findings in Section 624A of the Cable Television Consumer Protection and Competition Act of 1992 (47 U.S.C. §544A(a)) Congress stated that as a general premise cable operators should use technologies that will prevent signal thefts while permitting consumers to benefit from new and innovative features and functions of receivers and recorders.<sup>15</sup> While the overall objective of Section 624A is to promote compatibility between consumer equipment and cable systems such that subscribers may enjoy fully the benefits of available programming and functions of their television receivers and VCR's, Congress specifically directed the Commission in its rulemaking requirements to consider the needs of cable operators to protect the integrity of the signals transmitted against theft or unauthorized reception.<sup>16</sup> More specifically, Section 624A(b)(2) states:

"(2) SCRAMBLING AND ENCRYPTION. In issuing the regulations referred to in paragraph (1), the Commission shall determine whether and, if so, under what circumstances to permit cable systems to scramble or encrypt signals or to restrict cable systems in the manner in which they encrypt or scramble signals except that the Commission shall not limit the use of scrambling or encryption technology where the use of such technology does not interfere with the functions of subscribers' television receivers or video cassette recorders."<sup>17</sup>

In issuing regulations, the Commission has broad discretion to determine the circumstances to determine *whether*, and if so, the circumstances under which systems may scramble or encrypt service. Complete prohibition against scrambling the signal on the basic tier is overly broad in view of the less onerous alternatives discussed above, in all situations

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<sup>15</sup>47 U.S.C. §544A(a)(3).

<sup>16</sup>47 U.S.C. §544A(c)(B).

<sup>17</sup>47 U.S.C. §544A(b)(2).

where operators offer single tier service. Each of the alternatives proposed by Barden more closely follow the Congressional mandate given the Commission. Because of the minority of operators offering only single tier service, each of the alternatives discussed will lessen the exposure of such operators from theft, but also will not hinder compatibility between consumer equipment and cable systems.

## VI. CONCLUSION

The Commission's proposed remedy to the electronic consumer equipment compatibility is like trying to apply epoxy patch to the hull of the Titanic. It will simply be ineffectual. As noted above, the Commission has found that very few operators currently scramble basic tier services. Yet in the Commission's Consumer Electronics and Cable System Compatibility Report, the Commission states that one-third of basic-only subscribers and more than one-half of all basic subscribers who purchase above-basic services use set-top converters.<sup>18</sup> There are two clear reasons why so many converter boxes remain in use.

First, since very few operators scramble basic services, the one-third of the basic-only subscribers require set-top converters since they do not have cable-ready receivers. Therefore, whether or not the signal is scrambled is immaterial. Second, subscribers are using set-top converters to receive services other than basic. The Commission is not proposing elimination of scrambling for these above-basic services. Unless the converter box is physically taken out of the distribution line,<sup>19</sup> the subscriber will still have to use the converter to receive basic tier

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<sup>18</sup>Federal Communications Commission, Consumer Electronics and Cable System Compatibility Report, October 1993 at p.12.

<sup>19</sup>E.g., through use of an input selector switch.

services even if the basic services are themselves not scrambled. Therefore, even if the Commission eliminated scrambling of basic tier services, the number of set-top converters will not appreciably decrease.

If the Commission is intent on prohibiting basic tier scrambling, Barden urges the Commission to consider modification of its proposed prohibition against scrambling on the basic tier by:

1. Delaying implementation of the prohibition of scrambling the basic tier until such time as new technologies have been sufficiently identified and made readily available to facilitate compatibility between signal scrambling and consumer electronic equipment in those instances where only a single tier is offered to an operator; or
2. Allow operators, such as Barden who have currently expended or had bona fide plans at the date of the *Notice* to expend significant capital to install signal scrambling for their signal tier service to be exempted from application of the rule; or
3. Limit the scrambling prohibition to the minimum contents of the basic tier defined in 47 C.F.R. §76.901.

**Respectfully submitted,**

**BARDEN CABLEVISION**

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